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In The

Supreme Court of the United States

October Term, 1972

No. 72-142

JOHN J. RUISI and DOROTHY C. KORN,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

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JOHN J. RUISI and DOROTHY C. KORN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Statement

This reply memorandum is submitted in support of petitioners' application to this Court for a Writ of Certiorari.

We respectfully submit that this Court should consider the recent case of UNITED STATES v. DALE PAUL GLUP, Criminal No. 01607, decided

by District Judge Denney of the United States District Court for the District of Nebraska on the 12th day of April, 1972. In that case Judge Denney was dealing with the same Statute involved herein, namely 18 U.S.C. §922(a)(1). He did not interpret the Statute the way the Government asks this Court to interpret it but, on the contrary, supported the position taken by the petitioners herein. He dismissed the indictment therein against Dale Paul Glup and, it is our understanding that the Government has not appealed that dismissal. The decision and opinion of District Judge Denney follows:

Memorandum and Order

[Filed April 12, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Crim. No. 01607

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DALE PAUL GLUP,)
)
Defendant.)

APPEARANCES:

For Plaintiff — Thomas Thalken
Asst. United States Attorney
for the District of Nebraska

For Defendant — William Lamson,
of Omaha, Nebraska.

DENNEY, District Judge

This matter comes before the Court on numerous motions of the defendant. The determination of these motions becomes moot upon the Court's decision as to defendant's motion for an order of the Court dismissing the indictment against him [Filing No. 12]. -

Defendant is charged, in a single count, of violation of 18 U.S.C. §922(a)(1). The specific offense alleged is that defendant was an unregistered dealer in firearms. Apparently, some 89 weapons were seized, pursuant to a warrant, and the government possesses some documents and advertising materials which, if introduced into evidence, could probably prove dealing under the statute.

Defendant asserts several grounds in his motion, but only the second basis will be discussed here. In that attack upon the indictment, defendant asserts that the indictment is faulty for failure to charge a connection with interstate commerce.

Section 922(a)(1), under which defendant is charged, reads as follows:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce . . .

The question presented is whether the last five words of the section modify the entire section or merely the phrase "to ship, transport or receive any firearm or ammunition."

If this statute requires that unlicensed dealing be in interstate or foreign commerce to constitute an offense, then defendant's attack will be grounded upon a failure to include that allegation within the indictment.

Reading the section as though the latter interpretation was correct results in the following application to this case:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammunition . . .

Reading the section as though the last five words apply to the situation in this case results in the following:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammunition . . . in interstate or foreign commerce . . .

The question involves the construction of ambiguous language. Neither of the above constructions is compelling upon the face of the statute.

The major case construing a statute passed under a companion title in the Omnibus Crime Control and Safe Streets Act is United States v. Bass, 404 U.S. 336 [1971]. The prosecution contends that the Bass decision should be narrowly limited to that particular section construed and rests wholly upon the ambiguity found and subsequent construction of the words therein. Bass dealt with 18 U.S.C. App. §1202(a)(1) contained in Title VII of the Act while the present case deals with 18 U.S.C. §922(a)(1), contained in Title IV of the Act.

The prosecutor is correct in that the ambiguity of 18 U.S.C. App. §1202(a)(1) cannot be allowed to infect each section of every Title of the Act. However, the section involved here possesses its own ambiguity. So finding, as in Bass, this Court must attempt to construe §922(a)(1) to determine the scope and effect of its language.

The Bass decision goes beyond the legislative history of the particular section involved because it could not clear the ambiguity by a reading of

that history. Resort to the history of a statute is the second-stage procedure of construing a statute. Subsequent to reviewing such history, if the murky waters have not yet cleared, the Court must apply rules of construction established, maintained and modified for decades by the Courts as the just, fair and consistent method of determining the scope and meaning of legislative pronouncements. Artificial as these rules may at times seem in relation to determining true legislative intent, they are the only tools by which courts may function as they must and probably result in a just, if not always correct, determination in the main.

This Court has already noted that the statutory language is reasonably open to at least two constructions. It is, thus, found to be ambiguous and not open to construction upon its face.

The second step is a determination of legislative intent from the legislative history of the statute. Although there are comments to the contrary, the Court finds that predominant throughout the debate of the Act is the concern that it not impair or impede state law enforcement. In fact, the Act was to promote more effective enforcement of local police regulations and bolster, not invade the states in their protection of their own citizens. The comments of some legislators notwithstanding, the Court finds sufficient diversity of opinion as to the coverage of the Act in the floor debates to warrant a finding of inconclusive legislative intent.

At this point, the Court finds the two major underpinnings of Bass directly applicable. In the language of the Bass decision:

> "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

404 U.S. at 347. And:

> "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." (Emphasis added.)

404 U.S. at 349.

The Bass decision notes that the first rule of construction rests upon two policies. The first of these concerns the giving of fair warning of the limits of criminal conduct. Of all instances which can be imagined, surely the present one approaches the top of the list of situations calling for such a rule. As precious a right as the right to bear arms is, having been sewn into the living fabric of our Constitution, fair notice would be a prerequisite to the creation of an area of criminal conduct which heretofore has been honorable. If this statute were held to cover, given its present language, wholly intrastate dealing in firearms, this Court would be compelled to strongly question the statute, as applied to the offense charged against defendant in the indictment, as being unconstitutionally vague and ambiguous. To avoid such a problem, the construction given it here would be compelled at any rate.

Since the statute is here held not to reach wholly intrastate dealings in firearms, the question of Congress' power to reach such activities is not ruled upon. The Court would note, however, that such activities are peculiarly within the state police power and that the continued abuse of the commerce power to invade matters traditionally of state concern may lead to withdrawal from the overreach given that clause in areas outside the economic concerns of trade and travel.

The case of United States v. Gross, 313 F.Supp. 1330 (S.D. Ind. 1970), was a pre-Bass decision, and so far as it is inconsistent with this decision it is not found to be persuasive.

It is, therefore, the finding of this Court that the indictment against defendant is faulty in that it fails to allege a connection with interstate commerce and that such defect is fatal, requiring dismissal of the indictment. E.g., Russell v. United States, 369 U.S. 749 [1962].

IT IS THEREFORE ORDERED that the indictment be, and is hereby, dismissed.

Dated this 12th day of April, 1972.

BY THE COURT

s/ Robert V. Denney
Robert V. Denney
United States District Judge

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners